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Time, Inc. v. Firestone: Is *Rosenbloom* Really Dead?

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Golden presents several state action issues worthy of resolution on a national level. The issue of whether a less stringent state action standard should be applied in cases involving alleged racial discrimination should be definitively answered and the law in the circuits made uniform on this point. Also, the question of the impact of any constitutional right which defendant may assert on the state action decision should be considered so that courts throughout the country can focus on only the appropriate factors. Finally, and more specifically, the issue of the nature of state involvement necessary for a finding of state action in the private club context is worthy of further definition by the Court. *Moose Lodge* made it clear that licensing and regulation are not sufficient. However, *Gilmore* indicated that where the state makes public property available for private use, *Moose Lodge* is not entirely apposite. Since similar cases are likely to arise in the future, further guidance would be desirable. The Supreme Court has, however, denied certiorari in *Golden*.[71] It is submitted that this denial was unfortunate as the opportunity to make important contributions to state action theory was lost.

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Time, Inc. v. Firestone: Is *Rosenbloom* Really Dead?

The author suggests that the Supreme Court has redefined the once discarded subject matter analysis for determining the applicability of the constitutional privilege in defamation suits and incorporated it into a new, two-pronged test for determining whether a defamation plaintiff is a public figure.

Time, a nationally known weekly news magazine, published an item in its "Milestones"[1] section informing its readers that Russell A. Firestone, heir to the tire fortune and wife, Mary Alice Sullivan

tion is the implication of judicial approval of racism. Others include perpetuation of badges of slavery, the denial of equal opportunity to the excluded class, and lost potential for social integration. Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L. J. 1441, 1465-69 (1975).

71. 45 U.S.L.W. 3227 (U.S. Oct. 5, 1976).

1. TIME, Dec. 22, 1967, at 77.

Firestone, were declared divorced on the grounds of "extreme cruelty and adultery."[2] In actuality, when Mrs. Firestone filed her complaint for separate maintenance in the Circuit Court of Palm Beach County, Florida, her husband had counterclaimed for divorce on grounds of extreme cruelty and adultery. After discounting testimony of the extramarital affairs of Mrs. Firestone, the judge granted the counterclaim on the ground that "neither party is domesticated within the meaning of that term as used by the Supreme Court of Florida."[3]

After *Time* declined to issue a requested retraction,[4] Mrs. Firestone filed a libel action in Florida Circuit Court. The jury awarded her $100,000. After review by both the Florida District Court of Appeal, Fourth District,[5] and the Supreme Court of Florida,[6] the judgment was affirmed. On certiorari, the United States Supreme Court *held*, vacated and remanded: Although Mrs. Firestone was not a "public figure" within the framework of analysis discussed in *Gertz v. Robert Welch, Inc.*,[7] and therefore, *Time* did not fall within the constitutional protection enunciated in *New York Times Co. v. Sullivan*,[8] no finding of fault on the part of *Time* in its publication of the defamatory material was ever found by a Florida trial or appellate court as required by *Gertz*.[9] *Time, Inc. v. Firestone*, 96 S. Ct. 958 (1976).

The primary significance of the *Firestone* decision does not lie in the holding that the Florida courts failed to make the necessary finding of fault required by *Gertz*. Rather, its significance lies in the fact that the Supreme Court, again faced with the problem of defin-

2. In addition, the article included a statement that "[t]he 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.' "

3. Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972). However, until this point in time, lack of domestication of the parties had not been recognized by Florida law as grounds for divorce. Nonetheless, the supreme court upheld the final judgment of divorce on the ground of extreme cruelty. *Id.* at 225.

4. Firestone v. Time, Inc., 231 So. 2d 862, 863 (Fla. 4th Dist. 1972). Under Florida law the demand for retraction is a prerequisite for filing a libel action, and permits defendants to limit their potential liability to actual damages by complying with the demand. FLA. STAT. §§ 770.01, .02 (1975).

5. 279 So. 2d 389 (Fla. 4th Dist. 1973), *vacated*, 332 So. 2d 69 (Fla. 1976).

6. 305 So. 2d 172 (Fla. 1974). The history of the case is detailed in Beckham & Esquiroz, *Torts, Survey of Florida Law*, 28 U. MIAMI L. REV. 662, 696-98 (1974).

7. 418 U.S. 323 (1974).

8. 376 U.S. 254 (1964).

9. 418 U.S. at 347-48.

ing the "proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment,"[10] refused to grant the defendant a constitutional privilege.

In *New York Times* the Court had given birth to a constitutional privilege against defamation when it held that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with actual malice or reckless disregard for the truth.[11] The *New York Times* privilege was extended in *Curtis Publishing Co. v. Butts*[12] where plaintiff, the University of Georgia athletic director, sued for defamation as a result of a magazine article alleging that he had fixed a football game. Although Butts was not a public official, the Court still required him to prove actual malice or reckless disregard for the truth because the constitutional privilege was extended to cover publication of matter concerning any "public figure."

To resolve the issues in *Firestone*, the Court focused on the guidelines set down in *Gertz*, where the Supreme Court held that a public figure is one who occupies "[a role] of especial prominence in the affairs of society" and has been "thrust . . . to the forefront of particular public controversies in order to influence the resolution of the issues involved." Adapting the *Gertz* Court's test for a public figure, the Court in *Firestone* determined that the issue before it was whether the respondent, Mrs. Firestone, had assumed "any role of especial prominence in the affairs of society" or had "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[13] However, the Court was forced to apply the *Gertz* test to a plaintiff who fell somewhere in the sphere between a "private person" and a person traditionally perceived as a public figure.

The Court found that Mrs. Firestone was not a public figure. In doing so, it rejected *Time's* contention that because the Firestone divorce was characterized by the Supreme Court of Florida as a cause celebre,[14] it must have been a public controversy. Mr. Justice Rehnquist, writing the majority opinion, relied on the *Gertz* Court's

10. *Id.* at 325.
11. 376 U.S. at 279-80.
12. 388 U.S. 130 (1967).
13. 96 S. Ct. at 965.
14. 271 So. 2d 745, 751 (1972).

repudiation of *Rosenbloom v. Metromedia, Inc.*[15] In *Rosenbloom*, the plaintiff sued a radio station for libel because the station broadcast stories about obscenity charges against the plaintiff. The Court held that when a matter of public or general interest is published, a private individual may recover for libel only if he can prove that the publication was made with knowledge that it was false or with reckless disregard for the truth.

After the *Rosenbloom* decision, when deciding the question of what standard of liability extended to a media defendant, a court was first required to focus its attention on the particular plaintiff to determine if he was a public figure. If the Court found the plaintiff to be a private individual, then the emphasis shifted to the subject matter of the libel. "If a matter is a subject of public or general interest,"[16] then the defendant was found to enjoy a constitutional protection in the form of an actual malice test.

In *Gertz*, the Supreme Court chose to recede from *Rosenbloom's* broad application of the *New York Times* standard and substituted a two-tiered constitutional standard for libel law. The first tier is the *New York Times* privilege which may be invoked in libel actions involving plaintiffs with public status. The second tier is a less vigorous protection of publishers and broadcasters from liability, requiring a finding of fault when injury is claimed by plaintiffs of private status.[17] In analyzing the public status of a person for the purpose of the first tier, the *Gertz* court stated:

> For the most part those who attain this [public] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.[18]

A common interpretation of this language, coupled with *Gertz's* repudiation of *Rosenbloom*, has provided support for the proposition that the focal point of analysis in determining "public figure" status rests solely on the activities of the individual and that the

15. 403 U.S. 29 (1971).

16. *Id.* at 43.

17. For a detailed discussion of the two-tiered standard evolving from *Gertz* see 29 U. MIAMI L. REV. 367 (1975).

18. 418 U.S. at 345.

subject matter analysis employed in *Rosenbloom* is defunct. Further support for this contention rests on the fact that in *Gertz*, the Court pointed to Mr. Gertz's activities[19] in holding that: "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."[20]

In *Firestone* the Court continued its trend in receding from a broad application of the *New York Times* standard. Rather than directing its attention solely to the activities of the plaintiff, the Court seemed to revive some of the policies behind *Rosenbloom* and proceeded through a new two-pronged analysis. The Court looked first to the activities of the plaintiff and then to the subject matter of the controversy involved. This results in a balancing test. If the activities of the plaintiff are clearly private, it would become extremely difficult for the public nature of the controversy to tip the scales in favor of holding the person to be a public figure. The subject matter only becomes significant when the activities of the plaintiff are somewhere between private and public in nature.

Although this analysis is not specifically enunciated, it is implicit in the majority's opinion.[21] The Court examined the plaintiff's actions and found that she did not "freely choose to publicize issues as to the propriety of her married life" but rather that "[s]he was compelled to go to court."[22] The Court also thought it significant to examine the subject matter of the controversy. It pointed out that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*. . . ."[23]

The necessity for the Court to make this type of analysis raises the following question: What would the result have been if Mrs. Firestone had brought suit to enjoin busing of students instead of a separate maintenance action? One could argue that because of Mrs. Firestone's status as the wife of a member of a wealthy industrial family with the ability to call press conferences (as she did in the actual case)[24] that she would fall within the vague sphere between

19. *Id.* at 352.

20. *Id.*

21. Justice Marshall, in his dissent stated that the court was incorrect in using any analysis which included an examination of the subject matter of the controversy. *See* note 25, *infra*.

22. 96 S. Ct. at 965.

23. *Id.*

24. *Id.* at n.3.

the public and private person, thereby requiring a shift in analysis to the subject matter of the controversy. The court could find the anti-busing issue to be within the purview of the "public controversy" referred to in *Gertz*, although a dissolution of marriage through judicial proceedings was not; the former issue being sufficient to tip the scales in favor of granting the privilege, whereas the latter is not. If this would be the result, the subject matter analysis involving the "private" individual in *Rosenbloom* has not been totally displaced, but rather has been limited, redefined, and incorporated into a "public figure" analysis consistent with *Gertz*.[25]

The *Firestone* opinion also leaves open an interesting question concerning the public figure issue itself: Can a person be a public figure within a limited geographical area such as a community? The opinion seems to raise this question in passing but offers limited assistance in answering it. The Court stated that Mrs. Firestone "did not assume any role of especial prominence in the affairs of society other than perhaps Palm Beach society. . . ."[26] Perhaps the policy considerations behind the *Gertz* holding, including the promotion of wide-open debate and the avoidance of self-censorship, would call for an extension of the public figure doctrine to a limited community. There is no indication in *Gertz* whether the community leader involved in local controversies is the type of public figure the Court envisioned.

The language used in *Firestone* seems to indicate that being a public figure within a community such as Palm Beach is not sufficient to warrant an actual malice test. The *Firestone* Court did not believe that Mrs. Firestone was included in the ambit of people to whom the *Gertz* opinion was referring in their description of a public figure. A distinguishing factor which could be raised is that although Mrs. Firestone may have been a public figure in Palm

25. In his dissenting opinion, Justice Marshall disagrees with the majority's willingness to examine the subject matter of the controversy. According to Marshall

> [t]he meaning that the Court attributes to the term "public controversy" used in *Gertz* resurrects the precise difficulties that I thought *Gertz* was designed to avoid. . . .
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> . . . *Gertz* obviously did not intend to sanction any such inquiry by its use of the term "public controversy." Yet that is precisely how I understand the Court's opinion to interpret *Gertz*.

96 S. Ct. at 981.

26. *Id.* at 965.

Beach, the *Time* publication of the alleged libel transcended Palm Beach into the hands of readers throughout the country. The problem with this rationale is that it shifts the emphasis from the activities of the public figure and the subject-matter of the controversy to the geographic location of the publisher's readers. Would there then be adequate justification for holding that a local newspaper in Palm Beach could have published the same article which appeared in *Time* magazine and have been afforded the *New York Times* privilege?

Whether a person may be a public figure within a limited community is uncertain. In light of the Court's refusal to find as a public figure, a person who had voluntarily become a member of the "sporting set," a social group with special prominence in the affairs of society and whose activities predictably attracted the attention of a sizable portion of the public and who not only had access to the media for rebuttal but in fact used the media by calling press conferences, it appears that the sentiment of the present Court indicates a rather limited view[27] of the public figure doctrine.

The Court also rejected *Time's* argument that the privilege should extend to all reports of judicial proceedings by relying on two different factors. Initially, the Court refused any broadening of the rule set out in *Cox Broadcasting Corp. v. Cohn*,[28] which had held that a state may not impose sanctions on the accurate publication of information obtained from judicial records that are maintained in connection with a public prosecution and are therefore open to public inspection. Justice Rehnquist rejected *Time's* contention that because judicial proceedings contain some informational value on matters of "public or general interest", an actual malice test should apply. In so doing, the Court renounced a subject matter analysis in favor of "one focusing upon the character of the defamation plaintiff."[29] According to the Court:

> [E]recting the *New York Times* barrier against all plaintiffs seeking to recover from defamatory falsehoods published in what

27. As seen through his dissent, Justice Marshall would disagree with a limited extension of the public figure doctrine. He indicates that a person could be a public figure within a limited community. He envisions the sole focus of analysis to be centered on the actions of the individual. As such, the voluntary membership in the "sporting set" combined with the access to rebut by use of press conferences was sufficient for Justice Marshall to find Mrs. Firestone to be a public figure.

28. 420 U.S. 469 (1975).

29. 96 S. Ct. at 966.

> are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment.[30]

The Court did not specifically address the abandoning of the subject matter analysis except in its discussion on the extension of the *New York Times* privilege to all judicial proceedings. In light of the sweeping language of the Court,[31] it is difficult to pinpoint whether the subject matter analysis was rejected per se or was, more logically, intended to be eliminated only when discussing the issue of reports on judicial proceedings. As noted earlier, it is suggested that the subject matter analysis has not been abandoned in the resolution of the question of who or what constitutes a public figure.

It is difficult to delineate any concrete policy considerations for the Court's discrimination in applying a subject matter test. Perhaps Justice Rehnquist was offering some assistance when he stated: "The details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues thought to provide principle support for the decision in *New York Times*."[32]

A valid challenge to this conclusion may rest on the notion that important social change involving controversial subject matters often occurs in the courtroom. It would seem that the opportunity for "uninhibited, robust, and wide-open debate" would be discouraged if the media was unable to report on the developments of a case involving a controversial issue such as civil rights, for fear of a libel suit.

It might be questioned whether Justice Rehnquist's reasoning is sufficient to justify total abandonment of a subject matter analysis in deciding the question of whether a media defendant's report of a judicial proceeding is privileged. It would seem more consistent to apply the same type of two-pronged balancing analysis used when

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30. *Id.*

31. The Court stated that

> [w]hatever their general validity, use of such subject matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject matter test for one focusing upon the character of the defamation plaintiff.

Id.

32. *Id.* (citations omitted).

evaluating the public figure status of an individual and maintain a subject matter analysis, but limit the extension of the privilege to the "public controversy" intended by *Gertz*. When such a controversy is present, the media defendant should be afforded the *New York Times* privilege.

The second factor relied on by the Court in refusing to extend the privilege to reports of all judicial proceedings focuses on the "involuntary" aspect of the plaintiff's actions. Justice Rehnquist noted that:

> [W]hile participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them . . . . There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.[33]

The Court had also analyzed this voluntary versus involuntary aspect of the plaintiff's actions with respect to the public figure question. In discussing that issue, Justice Rehnquist stated that Mrs. Firestone

> was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court."[34]

This discussion of the voluntary versus the involuntary aspects of a plaintiff's actions as a factor to consider in evaluating whether to extend the *New York Times* privilege leaves open a perplexing question: Can a plaintiff be involuntarily thrust into the forefront of a public issue, thus granting the media defendant a privilege?

Mr. Justice Powell's opinion in *Gertz* offers little guidance in answering this question. There he stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary

33. *Id.* at 966-67.

34. *Id.* at 965 *quoting* Boddie v. Connecticut, 401 U.S. 376 (1971).

public figures must be exceedingly rare."[35] Later in the opinion, Justice Powell seems to assume broader possibilities of becoming an involuntary public figure when he states that "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[36] This language seems to contradict the "exceedingly rare" language quoted above.

The *Firestone* opinion offers no further assistance in resolving this question. The loose reference to the lack of any truly voluntary action on the part of the plaintiff does not offer sufficient guidelines for future courts. The limited analysis by the Court may possibly be justified by the facts of the particular case, but the Court could nevertheless have provided more definite standards for determining public figure status.

In view of the majority's decision in *Firestone*, it would be difficult to predict the outcome if the *Rosenbloom* facts were before the Court today. The Court's treatment of both the public figure and reports of judicial proceedings issues indicates that a different result might occur. Unfortunately, the pendulum appears to be swinging away from the necessary protections of the free press. The question now becomes how far back the Court will let the pendulum go. In order to avoid self-censorship of the press and to facilitate the airing of views on public issues, the Court must stop at this point and evaluate whether the line should be drawn at *Firestone*. It is submitted that the Court should not go further.

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35. 418 U.S. at 345.
36. *Id.* at 351.